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*2/15/2018*

**BEFORE THE REGIONAL FORESTER OF REGION  
FOUR OF THE UNITED STATES FOREST SERVICE**

**In Re: Appeal of Decision Notice/ )  
Finding Of No Significant Impact and )  
Environmental Assessment for the )  
Deer Creek Coal Mine Plan )  
Modification, Fed. Coal Leases U-06309 )  
U-2810, SL-050862, SL-051221 on the )  
Manti-La Sal National Forest )**

**UTAH ENVIRONMENTAL CONGRESS  
1817 South Main, Suite 10  
Salt Lake City, UT 84115**

**APPELLANT**

**APPEAL NO. \_\_\_\_**

**INTRODUCTION**

**STATEMENT OF FACTS**

**ARGUMENTS**

**REQUEST FOR RELIEF**

**DATED this \_\_\_\_ day of October, 2005**

**By \_\_\_\_\_  
Kevin Mueller, Executive Director,  
Utah Environmental Congress  
1817 South Main, Suite #10  
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(801) 466-4055  
on behalf of appellant**

## **Introduction**

NOTICE IS HEREBY GIVEN that the Utah Environmental Congress (UEC) appeals pursuant to 36 CFR § 215.7 to the Regional Forester of Region Four from the Decision Notice/Finding Of No Significant Impact (DN/FONSI) and Environmental Assessment (EA) for the Deer Creek Coal Mine Plan Modification, Fed. Coal Leases U-06309, U-2810, SL-050862, SL-051221 signed by Rod Player for Forest Supervisor Alice B. Carlton on August 25, 2005. This decision was noticed in the Sun Advocate (newspaper of record) on August 30, 2005.

The UEC is a non-profit organization dedicated to maintaining, protecting, and restoring the native ecosystems of Utah. The UEC has an organizational interest in the proper and lawful management of National Forests in Utah, including the Manti-La Sal National Forest. The UEC's members, staff, and board of directors participate in a wide range of recreational activities on the Manti-La Sal National Forest, including the area in and surrounding the action approved in the Rida/Huntington Canyon area.

The UEC represents 265 individual members, 37 organizations, and 59 businesses representing approximately 30,000 people, many of whom frequently use, recreate, hunt, fish, visit and otherwise enjoy this project area on the Manti-La Sal National Forest, and have a direct interest in its management.

The UEC claims standing to participate in the public land decision-making process on the grounds that it has been involved in forest management issues since its founding. Our members have hiked, fished, hunted deer and elk, recreated, enjoyed, and photographed the Manti-La Sal National Forest, including the project area. Our collective membership includes professional photography businesses and freelance photographers who make their living in part by photographing Utah's National Forests, including the Wasatch Plateau portion of the Manti-La Sal National Forest. The direct and indirect impacts associated with this decision detract from the rugged, natural splendor, biodiversity, fishing/hunting values and wilderness values in the affected watersheds that make these lands appealing to both professional photographers and our members who find enjoyment from and recreate in this project area.

In addition, the UEC's members are taxpayers that are required to pay for the activities approved. The irretrievable commitments of financial resources associated with this project are also borne by the American people as a whole. The UEC claims partial ownership of the public lands covered by this decision and consequently has legal standing to participate in the process and challenge those decisions it finds legally unacceptable.

The appellant is appealing the August DN/FONSI and EA on the grounds the decision and environmental documentation is legally indefensible. The appellant argues that the Manti-La Sal National Forest (MLSNF) has violated the National Environmental Policy

Act (NEPA), the National Forest Management Act (NFMA), well as the Administrative Procedures Act (APA).

The appellant desires and will request relief in the form of a remand of the decision made in the DN/FONSI signed by Rod Player for Forest Supervisor Alice B. Carlton on August 25, 2005 that was noticed on August 30, 2005 in the newspaper of record.

## **Statement of Facts**

The action proposed and approved is described as follows:

The new facilities would be located in Rilda Canyon, in Section 28, Township 16 South, Range 7 East, Salt Lake Baseline and Meridian, Emery County, Utah, about 8 miles west of the town of Huntington. The proposed mining plan modification calls for the construction of new surface facilities in Rilda Canyon, down-canyon from the existing facilities in Left Fork.

The proposed facilities would cover a long, slender area approximately 4,000 feet long by 200 feet wide covering 13.1 acres on the canyon floor. Of this area, the support facilities (portals, shop, office, etc.) would cover an area approximately 2,000 feet long by 120 to 250 feet wide (9.0 acres) at the west (up-canyon) end of the site. The remainder of the site to the east of the mine yard area would have hydrologic controls, two topsoil stockpiles, and a road turnaround. All facilities would be entirely on the north side of Rilda Canyon Creek except for one topsoil stockpile. The proposal would use the existing county road and 25 kv power line that run through the site. The county road would be paved. See Appendix E, Map 4 (Layout of Proposed Surface Facilities) for a complete description of the proposed facilities. Proposed facilities would include:

**Structures:** Office/bathhouse/warehouse building; four (4) vertical retaining walls constructed of 12-inch thick concrete; two (2) other retaining walls in the yard area; water treatment building; mine ventilation fan; 168-stall parking lot; underground vehicle parking garage; steel frame building to house fan motors; steel framed storage sheds to house bagged rock dust, ready-mix concrete, and other dry products; oil shed; fueling dock with 4,000 gallon above-ground diesel fuel storage tank; steel shed for storage of cans of oil and lubricant; rock dust silo; pneumatic pipeline for rock dust; and a sediment pond with supporting drainage structures.

**Power:** An existing 25 kv power line already provides power at the Left Fork Portal Facility. A transformer would be installed to supply power to the Rilda Canyon portal facility and there would be diesel generator backups for the ventilation fan.

**Water related facilities:**

**Culinary system:** 10,000-gallon steel water storage tank for treated culinary water.

**Sewage system:** Waste water from office/bathhouse/warehouse would be separated into gray water and black water. A 20,000-gallon temporary storage tank would hold black water (sewage) until it can be transported by truck to an approved disposal facility. Gray water (discharge from boot wash, showers, floor drains, etc) would be stored before being pumped into an abandoned portion of the underground mine workings. Permits from the U.S. Mine Safety and Health Administration (MSHA) and Utah Department of Environmental Quality, Division of Drinking Water Quality would be obtained.

**Runoff system:** a two compartmented runoff collection tank with 1) a 7,540 gallon compartment for gray water, and 2) an 18,500 gallon

compartiment for temporary storage of surface runoff water. Surface runoff would spill over into the gray water compartment of the tank. This system would also include an emergency spillway connected by pipe to the sediment pond; pump station to move surface runoff into collection tank.

**Drainage system:** two systems, 1) for collection of "undisturbed" or overland runoff water from above the portal site and from adjacent side slopes that bypasses the developed area and moves this runoff into the natural channel, and 2) for collection of runoff and all non-sewage waste water from the disturbed portal area, parking lots, storage areas, bathhouse/office/ warehouse, and fan area to convey it to the runoff collection tank for discharge into the mine. Culverts would direct any overflow to the sediment pond.

**Storage:** Mining and snow removal material and equipment would be stored on asphalt and gravel surface areas on the cut or embankment fills. A primary covered storage area would be constructed west of the parking garage to store non-coal waste, coal waste, oil, fuel facilities and bulk rock dust. Secondary covered storage areas would be constructed to store crib blocks, roof bolts, conveyor hardware, conveyor belting, beams, and other associated construction/repair materials. Another covered non-coal waste/sand/rock waste storage area would be constructed on the north side of the mine yard between the fan and access portal. Sand and salt for winter road maintenance would also be stored here. Coal and non-coal wastes would be hauled away.

**Soil Stockpile Storage Areas:** Two topsoil and subsoil stockpile areas not contiguous to the main facilities and on previously disturbed land (approximately 800 feet by 300 feet, 3.0 acres, and 320 feet by 220 feet, 1.1 acres) would be created. The smaller stockpile would be on the south side of Rilda Canyon Creek and accessed via the existing bridge.

**County Road:** The existing gravel road would be paved and widened. The road would be realigned to make curves less acute. The design speed would be increased. A trailhead parking lot would be installed to the east of the limited access mine yard to provide public access to Forest Service recreation areas west of the proposed facility.

The projected active life of the facilities is 15-20 years. When the mine shuts down, the site would be reclaimed. Structures would be removed, the site regraded to its original topography, topsoil from the stockpiles redistributed over the site, and all disturbed areas revegetated. The county road would be returned to a gravel surface. Reclamation would take approximately twelve years, two years for the actual demolition and site restoration work and the balance of the time for vegetation to become established before final bond release.

The OSM usage analyzes the magnitude of impacts in terms of their intensity or severity and their duration. The following table from EA table 4.1 defines important terminology:

Table 4.1 OSM Analysis Terminology	
<b>CONTEXT:</b> routine action for OSM	
<b>INTENSITY OF IMPACTS</b>	
Negligible	ranging from immeasurable and undetectable to lower levels of detection
Minor	detectable, but slight
Moderate	readily apparent environmental effects
Potential to become major	potentially severe adverse or exceptional beneficial environmental impacts
Major	severe adverse or exceptional beneficial environmental impacts
<b>DURATION OF IMPACTS</b>	
Short term	life of the mine, including the reclamation period (approximately 30 years)
Long term	after bond release

Note that short term impact means for 30 years, and also note definitions of intensity of impacts.

The Proposed Action would occur in phases over a period of approximately 30 years. The type of activity occurring and thus the environmental effects would vary with each phase. The initial construction of the facilities would occur for 0-2 years. Active mining operations would take place for approximately 15 years. Active reclamation (demolition and removal of facilities, restoration of topography, topsoil replacement, revegetation) would take about 2 years. This would be followed by a SMCRA-mandated 10-year bond release period to establish vegetation. PacifiCorp's management responsibility for the site lasts until bond release, or approximately 30 years. Active mining and reclamation would last about 20 years. The balance of the time would consist of custodial management (monitoring and maintenance).

The appellant has participated in the public comment and involvement process at all points in this process. All of the issues raised in this appeal were raised in comments. All comments submitted by and on behalf of appellant are hereby incorporated by reference, as well as the Forest Plan and associated ROD and FEIS.

## Arguments

The ensuing arguments will demonstrate the Manti-La Sal National Forest (MLSNF) has violated National Environmental Policy Act (NEPA), the National Forest Management Act (NFMA), the Forest Plan, as well as the Administrative Procedures Act (APA).

### **I. The Manti-La Sal National Forest violated the NEPA by failing to prepare an adequate analysis of the cumulative impacts, compartmentalization of related actions and their impacts, and because the EA does not support a Finding Of No Significant Impacts (FONSI).**

"Cumulative impact" is defined in NEPA as, "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future action regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time."<sup>1</sup>

In deciding whether an agency's decision not to prepare an EIS is appropriate, the "responsible agency must have 'reasonably concluded' that the project will have no significant adverse environmental consequences." *San Francisco v. United States*, 615 F.2d 498, 500 (9th Cir. 1980). An agency's decision not to prepare an EIS is impermissible if the agency fails to "supply a convincing statement of reasons why potential effects are insignificant." *The Steamboaters v. FERC*, 759 F.2d 1382, 1383 (9th Cir. 1985). "[T]he statement of reasons is 'crucial' to determining whether the agency took a 'hard look' at the potential environmental impact of a project. *The Steamboaters v. FERC*, 759 F.2d at 1393; *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n.21 (1976).

"To support an EA/FONSI, an agency must produce 'a convincing statement of reasons to explain why a project's impacts are insignificant.'" *Pacific Marine Conservation Council, Inc., v. Evans*, 200 F.Supp.2d 1194, 1204(N.D.Cal. 2002).

"Significant", "effects", and "human environment" are all defined in detail by the Council on Environmental Quality regulations implementing NEPA. 40 C.F.R. 1508.27, 1508.8, 1508.14. In particular, "effects" include indirect effects, "related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems." 40 C.F.R., 1508(b). In addition, effects include: "ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative."

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<sup>1</sup> 40 CFR 1508.7

A federal agency's Environmental Assessment "must give a realistic evaluation of the total impacts and cannot isolate a proposed project, viewing it in a vacuum."  
Grand Canyon Trust v. Federal Aviation Administration, 290 F.3d 339, 342 (D.C.Cir. 2002).

Many parts of the EA disclose significant direct/indirect impacts from the action approved. For example:

"Road construction activity would primarily be confined to the disturbed corridor along each side of the existing road right-of-way. Widening and realigning the road would cause a temporary (less than 2 months), *major* increase in noise, fugitive dust, and sediment during the construction period. After that the effect would be *minor and short term*, and would eliminate or drastically reduce noise, fugitive dust and sediment runoff for the life of operations." EA page 48.

In light of above and the terminology table for effects presented supra in the statement of facts the action approved will involve severe adverse environmental impacts ("major") during road construction work in the form of noise, fugitive dust, and sediment impacts. This will be followed by detectible but slight impacts ("minor") for approximately 30 years ("short term"). In light of the fact that the EA discloses severe adverse temporary sedimentation impacts followed by lesser detectible impacts for 30 years impacts to aquatic habitat and macroinvertebrates MIS is significant. To top it off EA page 36 (footnote) discloses that the mitigation for this that consists primarily of buffer zones along the stream "would be as narrow as 25-30 feet in three locations where the active channel meanders north." In light of this, appellant notes that EA page 21 discloses that the current aquatic community MIS (macroinvertebrates) BCI "does not meet the Forest Plan standard of 75." The total significant temporary and additional lesser 30 year long impacts to the aquatic community in combination with the disclosure that this resource is already below Forest Plan standard underlines the substantive and procedural problems and legal failures resulting from the issuance of this FONSI when the evidence indicates significant impacts.

Furthermore, this one road construction component in Rilda Canyon is but one component of the much larger action approved that results in additional significant impacts in context and intensity to NEPA's human environment. Because the EA also compartmentalizes the larger action required and its total impacts there are additional impacts not accounted for. This illegal compartmentalization includes: (1) the change in the right-of-way to make it 80 feet wide that is said to be needed on the bottom of EA page 47, (2) due to traffic congestion and safety issues on highway U-31 resulting from the 20- fold increase in traffic coming off the highway onto the new paved road up Rilda Canyon (EA page 48), the company has already begun construction of a new left hand turn land on U-31 and (3) other actions such as the proposed drilling for water in Rilda Canyon necessitated by the action approved with this project (see attached comments). The FONSI is not supported by evidence before the agency and the need for an EIS is obviated. Furthermore, because actions needed such as the new left hand turn lane on



highway 31 are already committed to, under construction, and not analyzed as a component of this action, and because the new ROW needed is not incorporated or analyzed with this action, and the new water wells required by the action (see attached comments) are compartmentalized into other decisions and analyses, some of which are already being constructed, this EA and DN/FONSI is legally inadequate under NEPA not simply because of disclosed significant impacts, but also because the compartmentalization of the larger action required and its impacts additionally compounds the inadequacy of the EA and DN/FONSI.

Other direct/indirect effects of other components of the approved action add to the sum total significant direct/indirect impacts not accounted for above, where significant impacts are already indicated. One example is the other impacts from the action approved to MIS such as Golden eagle, macroinvertebrates, and Deer and elk MIS.

"The proposed facilities and related activities would interfere with the eagles' typical foraging flight path (down the side canyon to the main trunk of Rilda Canyon) and reduce the value of the foraging area in the canyon. The Forest Service estimates that 747 acres of foraging habitat would be reduced in value by the operations (USDA-FS 2005b). Additionally, fan noise could disturb the nesting birds. As discussed in part 4.2.1.6, Noise Resources,

fan noise attenuates with distance. The history of the nest shows a degree of tolerance for the existing fan noise and mine activity in the left fork of Rilda Canyon, but the proposed facilities would be closer and busier. Golden eagle behavioral responses to the proposed facilities could result in reduced foraging activity, interrupted nesting and breeding, reduced nest productivity, or territory abandonment (USDA-FS 2005b)." EA page 34

Here, the fan noise, road use and other parts of the approved action will cause impacts for a 30 year (short term) period that could result in territory abandonment. Page 35 of the EA indicates that there may also be other detectible minor impacts to MIS wildlife for 30 years

"Under the proposed action, there would be moderate effects on non-game/non-special status wildlife (depending on species) because of indirect habitat loss due to noise and activity-related avoidance/disturbance effects. These moderate effects would be short term. They would last for the projected life of the active mining and reclamation operations in Rilda Canyon (15-20 years) and would cease when the site entered the custodial reclamation phase (approximately 10 years)." EA page 35

This shows additional readily apparent environmental effects/impacts ("moderate") that may last about 30 years to additional wildlife.

Compounding the above is the inadequate cumulative effects analysis. Page 53 of the EA notes that big game MIS such as elk and its critical winter range in Rilda canyon will incur not just direct/indirect impacts for about 30 years from this action, but proposed coalbed methane exploration will add cumulative impacts, as will indirect impacts from "the proposed timber sale site." However, it is never said what proposed timber sale

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would add to cumulative impacts to the elk MIS. EA page 95 and 96 displays the reasonably foreseeable actions and their residual effects that would add to the total cumulative impacts of this action, and the only timber sale mentioned is the SITLA timber sale. Because the residual effects of this timber sale are said to include only increased soil compaction, increased erosion, and road access to a roadless area, but NO impacts to the critical elk MIS winter range are disclosed, it is unknown what timber sale site would add to the cumulative impacts of the critical elk MIS winter range in the area. Finally, while EA page 53-54 notes private economic loss to agricultural areas resulting from the elk MIS being displaced onto hay fields, damaging fences and irrigation fields, there is no attempt to disclose the resulting cumulative impacts to the elk MIS or its population trends resulting from those off-Forest conflicts with private interests.

The EA and FONSI are additionally adequate because the action includes includes uncertain effects and application of an experimental procedure or practice.

"This experimental practice would test the feasibility of storing of existing topsoil materials in place in areas where: 1) original, pre-existing soil structure was disturbed by historical coal mining; 2) native soils lie on steep slopes." EA page 25.

This contradicts with finding of no significant impact point 4 of the DN/FONSI. Finally, as indicated in the attached FAX from the Forest Service, it has long been suspected even by the Forest that the proposed facilities may result in significant impacts. While the EA indicates that there are significant impacts and the cumulative effects analysis is not complete, the need for an EIS is obviated even when there may be significant impacts.

"[E]ven a slight increase in adverse conditions that form an existing environmental milieu may sometimes threaten harm that is significant. One more factory ... may represent the straw that breaks the back of the environmental camel."

Grand Canyon Trust v. Federal Aviation Administration, 290 F.3d 339, 343 (D.C.Cir. 2002). "To support an EA/FONSI, an agency must produce 'a convincing statement of reasons to explain why a project's impacts are insignificant.'"

Pacific Marine Conservation Council, Inc., v. Evans, 200 F.Supp.2d 1194, 1204 (N.D.Cal. 2002). The government "is not required to find a proposed project insignificant in the absence of readily available information to the contrary; rather, it is required to create an EIS for any project which may significantly affect the environment. Under NEPA, it cannot use the lack of existing information as a basis for acting without preparing an EIS...." Sierra Club v. Norton, 207 F.Supp.2d 1310, 1336 (S.D.Ala. 2002). Adequate Research Must Be Done. "NEPA requires each agency to undertake research needed adequately to expose environmental harms." Sierra Club v. Norton, 207 F.Supp.2d 1310, 1335 (S.D.Ala. 2002). "An agency must generally prepare an EIS if the environmental effects of a proposed agency action are highly uncertain." ... "Preparation of an EIS is mandated where uncertainty may be resolved by further collection of data, or where the collection of data may prevent speculation on potential effects." ... "The purpose of an EIS is to obviate the need for speculation by insuring that available data are

gathered and analyzed prior to the implementation of the proposed action." Makua v. Rumsfeld, 163 F.Supp.2d 1202, 1216-17 (D.Hawaii 2001).

In light of all of the above the DN/FONSI is arbitrary and capricious and in violation of the NEPA and the APA because the FONSI is contradicted by the evidence before the agency and because the cumulative effects analysis is not complete, and because components of the larger action required to complete this project have been illegally compartmentalized outside of this environmental document.

**II. The Manti-La Sal National Forest violated**  
**-the Forest Plan and National Forest Management Act (NFMA) requirements for**  
**Management Indicator Species and Diversity monitoring and standards**  
**-and NEPA regulations at 40 CFR part 1505.2 - 1505.3.**

Page 5 of the Record Of Decision (ROD) (incorporated by reference) that approves the current Forest Plan states, "During implementation, when various projects are designed, site-specific analysis will be required. Analyses may take the form of Environmental Assessments [40 CFR 1508.9], environmental Impact Statements [40 CFR 1508.11], or categorical exclusions [40 CFR 1508.4]. The Supervisor may amend the Forest Plan in accordance with 36 CFR 219.10(f) [1982]. Any resulting documents will be tiered to the FEIS, pursuant to 40 CFR 1508.28 [1982]." This EA is therefore tiered to the Forest Plan FEIS and no Forest Plan amendments are proposed, analyzed, or contemplated at this time. Page 14 of the Forest Plan ROD states, "Maintaining visual quality objectives, viable populations of wildlife management indicator species" ... "are all examples of standards and guidelines which act as mitigation measures." It goes on to state, "Mitigating measures, stated as standards and guidelines, are intended to be adopted and enforced in project level activities"

The Manti-La Sal National Forest 1986 Forest Plan, as amended, identifies these 6 MIS:

- Northern goshawk
- Elk
- Mule deer
- Macroinvertebrates
- Golden Eagle
- Aberts squirrel

All but the last of the above MIS are selected and used for this analysis. However there is a failure to monitor these MIS population trends. Oddly, even for some of the most important MIS for this project area (such as macroinvertebrates), there is no functional project area presentation or analysis of its population trends. The recent 10<sup>th</sup> Circuit Court of Appeals rulings inform these issues:

*The Forest Service must gather quantitative data on actual MIS populations that allows it to estimate the effects of any forest management activities on the animal population trends, and determine the relationship between management activities and population trend changes." Utah Environmental Congress v. Bosworth, 2004 U.S. App. LEXIS 12441 (10th Cir. 2004).*

*Under a plain reading of § 219.19 and UEC I, we conclude that the Forest Service must select an MIS with some evidence that it is "present in the [project] area." The Forest Service must then collect "actual, quantitative population data," id. at 1226, to monitor population trends and to determine relationships to habitat changes. See 36 C.F.R. § 219.19(a)(6). "... "Selecting only one or two (or a few) acceptable MIS actually present in a project area cannot satisfy the overall monitoring obligations of § 219.19. See Martin, 168 F.3d at 7 (concluding that the Forest Service violated §§ 219.19 and 219.26 because it "ha[d] no population data for half of the MIS in the Forest and thus [could not] reliably gauge the impact of the timber projects on these species"). Utah Envtl. Cong. v. Bosworth, No. 03-4251, 2005 U.S. App. LEXIS 17619, at \*1 (10<sup>th</sup> Cir. Aug. 19, 2005).*

As this Circuit Court has ruled, the Forest is entitled deference in the MIS it selects for projects implementing the Forest Plan, but in order to meet the requirements of §219.19, that MIS selection must include sufficient MIS actually in the project area and gather population trend data so that the effects of the project implementing the Forest Plan on the MIS population trends can be determined and analyzed to meet the NFMA and Forest Plan requirements. This needs to be done in the analysis of this project, and evidence in the EA indicates that the Forest has not met its MIS selection or monitoring requirements. Details on the selected MIS are below.

The MLSNF Forest Plan page IV-6 identifies macroinvertebrates as a Management Indicator Species (MIS), and the WRR for this project selects and considers this MIS for the analysis of this proposed action. Forest Plan FEIS page III-34 states that the macroinvertebrates MIS, "are ecological indicator species in aquatic habitats and the ability of that habitat to support fisheries" ... "Aquatic habitat on the Forest consists of 680 miles of stream fisheries and 1,765 acres of lakes and reservoirs. Macroinvertebrates are found in these areas" ... "Changes in aquatic habitats, resulting from activities in the terrestrial habitat, are rapidly seen through changes in the species composition and biomass of macroinvertebrates." A list of five aquatic insects is identified as what is minimally needed to accomplish any meaningful assessment of impacts from a project on the aquatic ecosystem. The Forest Plan and its FEIS state that the chosen list of macroinvertebrates would be treated as one MIS.<sup>2</sup> The same page of the Forest Plan and its FEIS state, "These habitats can be monitored for macroinvertebrates on a priority

<sup>2</sup> Forest Plan FEIS page III-34, and Forest Plan page II-34

basis as needed to determine the specific effects of any one project or activity, as well as the effects of general Forest land management, on the aquatic resources." The Forest has simply not met this obligation. The macroinvertebrates MIS monitoring standards state, "Improve and maintain a good or above Diversity Index (DAT) of 11-17, a standing crop of 1.6 – 4.0, and a Biotic Condition Index (BCI) or 75 or above." Forest Plan page III-20. The Forest Plan Chapter 4 monitoring table for macroinvertebrates states, "for baseline stations or as needed for select project activities" include a minimum of gathering of data using the R4 GAWS, BCI and HCI macroinvertebrates indices. The Forest Plan expects the macroinvertebrates trend data to be collected "For baseline stations or as needed for select project activities."

Aquatic macroinvertebrates monitoring is well established to be a good aquatic management indicator species, as is explained in the introduction to the Data Analysis and Interpretation section of the Aquatic Macroinvertebrates Monitoring Reports you receive from the National Aquatic Monitoring Center, which does your macroinvertebrates monitoring. The Forest's 1999 macroinvertebrates MIS monitoring report from this Utah State lab is enclosed to provide an example (CD). Reading the report makes is overwhelmingly clear that the National Aquatic Monitoring Center sees strong value in monitoring aquatic macroinvertebrates because changes in their indices quickly reflect changes in aquatic habitats – even within one year of management activities in the affected watershed.

This analysis uses the Forest Plan and also applies the 1982 NFMA MIS regulations:

"Management Indicator Species (MIS) are species identified by the USDA-FS to fulfill requirements of 36 CFR Chapter II - 219.19. MIS are used as proxies to monitor habitat conditions. For the MLSNF, there are the following MIS:

Mule deer (*Odocoileus hemionus*)

Northern goshawk (*Accipiter gentilis*)

Golden eagle (*Aquila chrysaetos*)

Aquatic macroinvertebrates (several phyla)

Elk and mule deer are discussed in part 3.3.1.1.1 above. The northern goshawk is discussed in part 3.3.1.1.2, Special Status Animal Species, above." EA page 19-20

No other NFMA regulations are cited or relied upon. The only NFMA regulations cited and used are the 1982 NFMA regulations, including 36 CFR part 219.19. This is consistent with the Forest Plan and its FEIS and ROD that this decision has been tiered to.

Page 35 and other parts of the EA discloses smaller but measurable impacts to terrestrial MIS for the "short term" 30 year duration of the action approved. EA page 34 notes that the golden eagle MIS effects could result in territory abandonment. Sedimentation is an impact on the aquatic community and its macroinvertebrates MIS. As disclosed earlier and on page 48 of the ea there will be temporary major impacts (defined as severe adverse impacts in the EA) from sedimentation increases followed by lesser minor (but

measurable) additional impacts from the action approved that would last about 3 decades. In light of this appellant points the Regional Forester to page 20-21 of the EA:

*"Aquatic Macroinvertebrates*

Aquatic macroinvertebrates are a group of water-dwelling invertebrates (insects, crustaceans, mollusks, worms, etc.) that are important as indicators of water quality and as a prey base for fish. Key representatives are the insect orders Ephemeroptera (mayflies), Plecoptera (stoneflies), and Trichoptera (caddisflies), whose immature forms are aquatic. Because different species have different tolerances for environmental conditions, the particular mix of macroinvertebrates present can give an indication of water quality. Several numerical indices based on macroinvertebrate composition, such as the Hilsenhoff Biotic Index (HBI) and the Biotic Condition Index (BCI), are used to infer water quality.

Aquatic macroinvertebrates in Rilda Canyon Creek were sampled at several locations in May 2004. A total of 814 individuals representing 33 taxa were collected in 6 samples. Mayflies of the genus *Baetis* dominated the samples (nearly half of the total specimens), with *Cinygmula* mayflies and oligochaete worms secondary dominants, comprising around a tenth of the total each (Vinson 2004). The Rilda Canyon Creek samples had a mean HBI of 3.28 (0-10 scale), indicating "slight organic enrichment." The mean dominance weighted community tolerance quotient (CTQd) was 72. This index varies from around 20 to 100; lower values indicate better water quality (Vinson 2004). Using a potential (i.e. reference, or CTQp) value of 50 with this CTQd gives a BCI value of 69.4, which does not meet the Forest Plan standard of 75. Existing BCI data suggest that portions of the Huntington Creek watershed are stable and portions are experiencing a downward trend, but there are too few data to reliably determine trends for macroinvertebrates on the MLSNF (USDA-FS 2005b)." EA page 20-21.

The above establishes that there is a:

- Failure to gather population trend data for this MIS;
- Failure to meet Forest Plan standard (committed to in the Forest Plan ROD) of a minimum macroinvertebrates MIS of BCI 75;
- Failure to gather data and maintain Forest Plan monitoring and standards for HBI.

All of the above is in violation of the Forest Plan and NFMA. This also is in violation of NFMA regulations cited and applied for this project that includes 36 CFR part 219.19.

This is also in violation of NEPA and its implementing regulations at 40 CFR part 1505.2 and 1505.3. "Mitigation (1505.2(c)) and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency"

As noted earlier page 14 of the Forest Plan ROD states, "Maintaining visual quality objectives, viable populations of wildlife management indicator species" ... "are all examples of standards and guidelines which act as mitigation measures." It goes on to state, "Mitigating measures, stated as standards and guidelines, are intended to be

adopted and enforced in project level activities" Failure to monitor, and the failure to enforce the monitoring and mitigation measures for MIS such as the macroinvertebrates MIS with this action implementing the Forest Plan that was approved in with the Forest Plan ROD is arbitrary, capricious, and in violation of NEPA, its above implementing regulations, and the APA.

### **III. The Manti-La Sal National Forest violated the mandate of the Administrative Procedures Act.**

The Manti-La Sal National Forest acted arbitrarily and capriciously in reaching its decision. The APA requires all agency actions to conform to general standards of regularity and rationality. The courts will overturn agency decisions that are "arbitrary, capricious, or an abuse of discretion."<sup>3</sup> The Supreme Court has held:

"Normally, an agency [action] would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."<sup>4</sup>

The appellant has demonstrated that the Forest Service acted arbitrarily and capriciously in violation of the APA and NEPA by issuing the FONSI when the evidence in the EA runs counter to the finding of no significant impact. The failures to commit to, implement, and follow the monitoring and standards committed to in the Forest Plan ROD for MIS such as macroinvertebrates monitoring and minimum standards is arbitrary and capricious, violating the NEPA and the APA. The NFMA and Forest Plan violations relating to MIS are also already demonstrated to be in violation of the APA.

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<sup>3</sup> 5 USC 706

<sup>4</sup> Motor Vehicle Manufacturers' Association v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983)

### **Request for Relief**

Due to the violations of the numerous Federal laws, regulations, the Forest Plan, its FEIS and ROD, the appellant asserts that this project cannot be considered legal. The appellant requests relief in the form of a full remand of the decision made in the DN/FONSI for this project.